POLL.

THE WAR POWERS

OF

THE GENERAL GOVERNMENT

WHO MADE THE WAR.

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THE DUTY OF ALLEGIANCE AND PROTECTION.

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OF

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THE

War Powers of the General Government.

The purpose of the following pages is to offer some considerations in respect to the powers and duties of the General Government, in its endeavors to suppress the present insurrection.

But to treat this subject intelligently, it is requisite to recur briefly to the peculiar origin and characteristics of the insurrectionary movement.

And the first remark to be made is, that the rebellion differs from most others, in the singular fact that it did not proceed so much from the people of the States, which nominally seceded, as from the governments of those States.

At the outset, it was, for the most part, a conspiracy of official persons. And to render the enormity greater, these very traitors, using the democratic party, as a means, had sought and obtained office only for the purpose of employing the power it gave them to strike down the government of the nation.

This was the condition of things throughout the Southern States. The Conspirators held every position of public influence, executive, legislative, and judicial; while as cabinet ministers, or members of Congress, they controlled the administration at Washington.

At length, when the opportunity, so ardently hoped for, arrived, they raised the standard of revolt; and then the loyal men of the South found themselves wholly without the means of effectual opposition to a treason which held in its hands every State authority, and seemed, at the same time, to have even the countenance of the General Government. What could these patriots do?

The adversaries of the nation bore the ensign of State sovereignty, and thus appeared to be clothed with all the colors of political legitimacy, while they possessed, in fact, the most energetic agencies of power; the purse, the sword, and the public press.

In addition to all this, the General Government, with apparent unconcern, beheld its banner trailing in the dust, yet moved not, either to avert the fact, or avenge the indignity. Can it, then, be a matter of surprise that Fidelity itself should falter, thus left without its natural protection, and in the presence of a power, for the time, irresistible?

To hasty thinkers, it may indeed seem strange, that a sufficient number of the Southern people could be induced to acquiesce in the rebellion, so as to give it the appearance of a popularity to which it could lay no just claim. And this political enigma can only be explained by a proper appreciation of the different theories which have prevailed, most widely, in regard to the nature of the complex Federal system under which we live; and more especially, by an accurate estimate of that peculiar theory, which has always been a favorite with the South.

As is well known, at the time of framing the Constitution, American statesmen were divided into two great schools of opinion, in relation to the character of the government which they were about to organize.

One school, aware of the necessity of strength, as well to prevent anarchy as to preserve independence, was led to advocate such a powerful national government as could make itself felt at home and feared abroad.

The other school, knowing the inherent tendency of all power to usurpation, proposed to strengthen the States, as a counterpoise to the authority of the General Government.

But as it was impossible for two schools, entertaining such opposite views, to agree, and yet, since both felt the necessity to be absolute for some new system, the result was a compromise, and that compromise was the present Constitution.

The great difficulty experienced by its authors was to trace the dividing line between the powers to be granted to the National Government and those to be reserved to the States and the People. They succeeded, nevertheless, in the accomplishment of the perplexing task in a manner which must excite the admiration of all posterity.

But there was one case for which they did not provide which might seem to be more important than any other. They prescribed clearly enough the bounds of Federal and State authority, but they omitted to appoint any judge of boundaries.

They constituted no umpire to determine questions arising from a conflict of jurisdictions.

And yet this was no oversight. They constituted no judge between the General and State Governments, because the exercise of any judicial functions in the case involved an impossibility. If the General Government were the exclusive judge as to the line between its own powers and those of the States it might push that line to any extent whatever. It would thus have the ability to absorb, at pleasure, the entire jurisdiction reserved to the States.

On the other hand, if the States were made the exclusive judges of the case, they could usurp in like manner all the powers of the General Government: for, whoever is judge in his own case will never fail to judge in his own favor, being sure to take for himself whatever is in controversy.

Again, to have provided some third power as arbiter in cases where the Federal Government and the States could not agree, would have rendered such power the common sovereign over both, so as to enable it to usurp every other authority.

Hence, our fathers designated no common judge between the States and the Nation; because the very idea of such a judge implies a contradiction. They therefore, merely provided, in the Federal Compact, for the division and distribution of the sovereign powers between the General Government and the States; trusting to the wisdom and prudence of each to remain content with its own share.

It has sometimes been made a question as to what is the nature of this Federal Compact, and who are the parties to it? But a very simple rule would seem to furnish a clear and decisive answer. It is a principle alike of natural law and of common sense, that all are parties to a contract who are intended to be bound by it, and assent to its terms. Hence, by this rule, the Constitution is a compact to which all the States and all the people as well as the General Government, are parties: because all these are mentioned in it, and all assented to it at the same time, or in succession.

But far different from this clear and precise view of the Federal Compact, have been the opinions of most politicians, and they have differed not less widely among themselves. For, as soon as the new government was fairly in operation, the two schools revived their old war, transferring the field of battle to the question of construction.

The advocates of strong government asserted the Constitution to be a compact between all the people of the United States in the mass, and therefore, inferred it to be indissoluble, unless by their consent.

On the other hand, those who dreaded the power of the National Government as being dangerous to the liberties of the States, assumed that the latter were in their corporate capacity the real parties to the Federal Compact; and hence, argued that any State might treat such compact as null whenever broken either by the other States, or by the General Government. And for this doctrine as to the power of any party to avoid a social compact in the case of a breach of its terms by the other side, the school of State Rights could always adduce the powerful support of the great writers upon natural law.

Rutherforth expresses it in his own inimitable style as follows:

"In these States, where the Constitution has divided the supreme power between the King and people, Grotius allows that the people have a right to resist the King by force when he invades their part of the power.

"Now, that part of the sovereign power which the monarch has, was granted to him, at first, by the compact which settled the Constitution, and is holden by him afterwards by the same compact. As long, therefore, as the obligation of the compact continues, he has a right to his part of the supreme power, and the people have no right to take it from him, either by war or by any other means, without his consent. But by wilfully and notoriously invading the other part, he breaks the constitutional compact.

"And this compact is so far like all other compacts that a violation of it on his side will leave the people at liberty to choose whether they will abide by it or not.

"A compact which is violated by one of the parties may be made void at the discretion of the other party.

"However, it is sufficient for our present purpose, that when the compact by which the people gave their civil government a part of the supreme power, is broken on his side, the obligation of it is voidable, or may be set aside at the discretion of the people."

It follows, from the point of view presented by Rutherforth, that in case of the alleged breach of the Federal Compact, or in any question of jurisdictional power arising between a State and the General Government, each must have the independent right to determine the matter for itself, because the Constitution has appointed no umpire between them. And it is plain that if those who have no common judge will persistently assert their claim to the same thing, the force of the strongest must necessarily take it. Hence, the feeble, when associated with the strong, would seem to have no other resource left, in a case of final difference, than to withdraw from the unequal association; and the right to withdraw would also seem as clear in a case where the other party might employ the prerogative of mere strength to put aside any material article in the agreement, by which the association was originally constituted. Hence, by this apparently fair mode of reasoning, a State would have the privilege of secession in a case where the National Government should invade its reserved powers, and thus violate the compact upon which the Union is alone founded.

Now it was this theory of the Federal system which always predominated in the Southern States, and naturally so, too, because it was the doctrine most favorable to the weaker section of the Union; and weakness, by the law of instinct, as well as that of reason, never fails to look with affection upon any means which may be employed to give it equality in a contest with power. Hence this theory was taught and accepted, in one form or another, almost universally for years in all the States where the rebellion is now in the ascendant.

The demagogues used it as the most reliable instrument to raise themselves to

official place; and, at length, the conspirators seized upon it as the only possible lever which could move their States out of the Union. Other circumstances, however, contributed to the same end. The ever-increasing numerical majority of the North excited uneasy apprehensions in the Southern mind. And, instead of laboring to tranquilize such fears, many Northern politicians were incessantly making utterances which necessarily tended to agitate them still more. At last, all these causes, operating jointly, resulted in the great insurrection.

But it is useless to consume more time in tracing the action of causes. The period for controversy has passed, and that for penning impartial history has not yet come. In the meanwhile, the urgent realities of the present demand undivided attention, and action as prompt as it should be powerful.

What, then, are the rights and duties of the General Government in its treatment of the insurrection?

This is the momentous question of the day; and the dreadful crisis seems to call for a more careful answer than it has yet received.

For, it must now be apparent to all, that this is no petty strife, but one of those great contests of arms which make eras in the war-cycle of history.

There are now seen standing face to face more than a million of men armed for murderous combat, and, as it were, pausing for the sound of the trumpet to signal them to mutual death! Yet to these is committed the question of civilization on the continent.

It, therefore, behooves us first of all to inquire, what is the object of this mighty war? Because it is the object alone which can justify the horrors of any war to a correct national conscience, or before the Judge of the Universe.

Now, on the side of the old flag, the instinctive answer of every lover of its stars is, "That we are fighting to preserve the Constitution and restore the Union."

Let us then accept this answer as the first and most general criterion of the power to carry on the war. Because it is self-evident that the powers employed must never be subversive of the very purpose which they are only intended to accomplish. Therefore, since the Government is using all the sinews of the public force to restore the authority of the Constitution over others, it is obliged, by every principle of justice and prudence to keep that Constitution inviolable on its own part. It cannot act, without becoming a thing of shame among the nations of the earth, upon the insidious maxim—that the end justifies the means. It cannot adopt the flagitious doctrines of a Jacobinic delusion, and break the Constitution in order to save it. Hence the special and avowed object of the war imposes upon its conduct this one general rule—that it can be carried on alone under the direction of Constitutional powers.

Now, the first question of power which naturally suggests itself to every mind is: by what authority granted in the Constitution does the Government assume to wage such a war as this at all?

By what color of authority does it muster and march such powerful armies across the borders of the States, there to encounter other hosts equally powerful and assuming to battle by the authority of those States?

By what sanction of authority does it strew the fields of Virginia with slain and wounded, taking thousands of prisoners, and exercising, and according to the adverse force, all the usual rights of a belligerent in a great war? The spectacle is as painful as it is unparalleled, and the inquiry cannot but be relevant, where is the warrant in the Federal Compact for this?

And yet, we need not go far to find an answer. The scenes of the dread array

themselves present the answer. They proclaim it to be a case of war. And yonder flies a flag that gives another answer, and yet the same. It is not the old flag of the nation. It has neither the stripes nor the stars which were wont to float in triumph over the old fields of our glory. That flag says, *it is a foreign war;* and the fact is true, as far as the strength of rebel prowess can make it so. Is not this, then, an answer as to the question of power? Here is war. Here are colors hostile to the nation.

And has not every government power to wage battle against a force bearing such a banner, on its own territory? The case is plain. The Federal Government is moving its soldiery under the warrant of the war power.

But no one will pretend to deny the power of the National Government to engage in a war. The right to make war is the self-defense of nations. And the Constitution expressly grants, as well as implicitly recognizes this power.

By one clause, it confers on Congress the right "to declare war." And it is manifest that no declaration is needed, when the war has been commenced, against the Government, by others.

There are, however, two cases of war; that of war with a foreign power, and that against an insurrection or rebellion; and the Constitution, in the clearest manner, makes provision for the latter case. It gives to Congress the authority, "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasion." Here, foreign war and internal war are both mentioned. By another clause, power is granted "to suspend the privilege of the writ of *habeas corpus*, when in cases of rebellion or invasion the public safety may require it."

Here, the power to suppress rebellion is necessarily conferred in terms. By another clause, the President is made "Commander in Chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

In this connection, it should be especially remarked that these clauses of the Constitution place the two cases of war, the one being internal, and the other external, in the same predicament as to power. Thus, Congress is to call forth the militia "to suppress insurrections and repel invasions." Thus the writ of *habeas corpus* is to be suspended only "in cases of rebellion or invasion."

And thus, the President only becomes "Commander in Chief of the militia of the several States when called into the actual service of the United States."

But the actual service of militia means war alone. Hence, as Congress can only call forth the militia to suppress insurrections and repel invasions, and the President can only command the militia when so called forth, it is plain that the two cases of insurrection and invasion are both located by the Constitution, in the common category of war. And the classification is perfectly accurate in a scientific point of view. Because insurrection and invasion are both alike cases of resistance to the sovereignty of the nation, the one being the resistance of an internal force, the other, that of a foreign and independent power; while each in precisely the same manner, tends to impede the execution of the laws, and to assail the supremacy of the Government.

Hence, if it be possible for the powers of war to be vested, by human language, they have been granted to the Government by the Constitution. That instrument makes provision for war in the only three cases where it can be imagined to arise—the war by "declaration," when the Government may choose to assail the territories of a foreign power; the war from "invasion," when a foreign power assails

our own territories; and the war of "rebellion," when subjects of the nation organize a force in opposition to its authority.

Secessionists, however, urge that the Government cannot march its armies into the territory of a State, against its expressed will. The objection is futile. For, how could the Government otherwise, either repel an invasion or suppress an insurrection?

The universal rule of law and reason is, that when a power is granted, all the means are granted at the same time, which may be necessary to render such power effectual. Nor can the action of the Government be regarded, in any sense, as war against a State, according to the meaning of the term "State" in the Constitution, which signifies only one of the local political bodies having a prescribed place in the Federal system, that is to say, one of the "United States."

But these new insurrectionary powers do not even pretend to have such a character. They deny it in arms. They resist the imputation unto death. They proclaim to all the world that they are no longer members of the "United States." Hence these cannot be considered "States," but only rebellious powers which have displaced at once the authority of the States, and that of the General Government. They are not so much evil stars that have wandered from their orbits as comets of revolution which have dashed away, for a time, the true stars of the system from their spheres.

Hence this is a civil war; and, therefore, the Government may employ all the Constitutional powers at its command for the subjugation of the insurrectionary forces in the field. But while it is enabled to employ all the powers, it is obliged to observe, at the same time, all the established usages of war. For the same enlightened maxims of prudence and humanity are as obviously applicable to a civil war as to any other.

According to Vattel, "When a party is formed in a State who no longer obey the Sovereign, and are possessed of sufficient strength to oppose him, or when, in a Republic, the nation is divided into two opposite factions, and both sides take up arms, this is called 'Civil War.'"

"Custom appropriates the term *Civil War* to every war between the members of one and the same political society. If it be between a part of the citizens on the one side and the Sovereign with those who continue in obedience to him on the other, provided the malcontents have any reason for taking up arms, nothing further is required to entitle such disturbance to the name of 'Civil War,' and not that of rebellion.

"This latter term is applied to such an insurrection against lawful authority as is void of all appearance of justice.

"The Sovereign, indeed, never fails to bestow the appellation of rebels on all such of his subjects as openly resist him; but when the latter have acquired sufficient strength to give him effectual opposition, and to oblige him to carry on the war against them according to established rule, he must necessarily submit to the use of the term *Civil War*.

"A civil war breaks the bonds of society and government, or at least suspends their force and effect; it produces in the nation two independent parties who consider each other as enemies, and acknowledge no common judge. These two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies. Though one of the parties may have been to blame in breaking the unity of the State, and resisting the lawful authority, they are not the less divided in fact. Beside, who shall judge them? Who shall pronounce on which side the right or wrong lies? On earth they have no common superior. They stand, therefore, in precisely the same predicament as two nations who engage in a contest, and, being unable to come to an agreement, have recourse to arms.

"This being the case, it is very evident that the common laws of war—those

maxims of humanity, moderation, and honor ought to be observed by both parties, in every civil war.

"Whenever, therefore, a numerous body of men think they have a right to resist the Sovereign, and feel themselves in a condition to appeal to the sword, the war ought to be carried on by the contending parties in the same manner as by two different nations; and they ought to leave open the same means for preventing its being carried to outrageous extremes, and for the restoration of peace."

Hence we perceive that the general power of the Government to direct the operations of this war is subjected to the necessary limitation that it shall be conducted in accordance with the public law of all civilized warfare.

There is, however, one essential difference between the case of civil strife and that of foreign war, which imposes a further qualifiction on the power of the Government.

One of the peculiar characteristics of foreign war is, that it not only places the opposing sovereignties in a state of mutual hosility, but also, at the same time, it imprints the condition of belligerents upon all their subjects individually, without their acquiescence, or even against their will.

In reference to a case of conflict with any foreign power, a nation cannot be at war and a single one of its citizens at peace. Or, in the words of Chancellor Kent:

"When war is duly declared, it is not merely a war between this and the adverse government in their political character. Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations, is a war between all the individuals of the one, and all the individuals of which the other nation is composed."

But the rule, in cases of civil war, is different, and for obvious reasons. Because no man should be implicated in the guilt of an insurrection unless he actually rebels.

No man becomes a part of the insurrectionary force unless he actually joins it. One cannot be considered criminal unless in both fact and intention he has committed a crime.

No citizen is held responsible on account of the locality of his domicil; and none can be hung for treason by mere fiction of law.

Hence, the rule of reciprocal hostility between all the subjects of two sovereigns at war, can find no sort of application in the case of a civil war.

In the case of a rebellion, no one is an enemy to the government unless he *voluntarily* casts off its authority.

Nor can the people of the Southern States be regarded as criminal, whether legally or morally, merely from the fact of their temporary submission to an irresistible force. The people of any city or district are always justified in doing so, alike in cases of invasion and rebellion. By the laws of God and man, the *vis major—irresistible force*—excuses everything.

It follows clearly, therefore, that in carrying on the present war, its operations can only be aimed against the insurrectionary force which resists the authority of the Government; because this is the only public enemy, and not the people of any State or district.

Another question may be proposed, as to what is the precise nature of the power to be employed in overcoming the resistance of rebellion? Is the instrument to be used the civil force, or the military force of the nation? If it be the former, it will be put in motion as subsidiary to judicial process; but if the latter, it must necessarily be moved by the President as commander-in-chief of the army.

This question, however, may be considered as having been virtually answered already. For, when a given case is pronounced to be one of war, it necessarily results that it cannot possibly be dealt with by any other than the military force. For, as defined by Demosthenes, "war is made against those who cannot be restrained in a judicial view;" and Grotius, citing the passage, adds, "judicial proceedings are of force against those who are sensible of their inability to oppose them; but against those who make or think themselves of equal strength, wars are undertaken." Hence, the war power springs into sudden activity the moment when the functions of the judicial power are rendered impracticable.

The general power of directing all the movements of any war is vested in the President of the United States, under the constitutional clause which makes him "Commander in Chief of the army and navy, and of the militia of the several States, when called into actual service."

Hence, the President, by virtue of this chief command, must necessarily direct every operation intended to overcome the resistance of an adverse force, whether it may be that of rebellion or invasion.

He is thus invested by the Constitution, with the exclusive authority to wield the whole military power of the United States, in its three great divisions of the army, the navy, and the militia of the several States when called into actual service. He is the sole power of the Government, having the competency to give any order in the application of martial law.

It is true, that Congress alone has the power "to declare war." But, as we have seen, war may come, without declaration on our part, by the hostile action of others, namely, by "invasion," or by "insurrection."

To Congress also is delegated the power "to provide for calling forth the militia to suppress insurrections and repel invasions."

But although Congress may provide for calling forth the militia, Congress cannot command them when in actual service. Congress may declare war, yet cannot direct such operations of the army and navy, as can alone render the war itself effectual.

The Constitution has appointed the President to the chief command, and there is no authority in our system to displace him. Nor does the President thereby become a part of the military force, though he obtains, by virtue of his office, the exclusive title to control it. And hence, when a case of war occurs, whether from invasion or insurrection, it is then his right and duty to interpose all the military power of the nation for the purpose of overcoming the hostile force in arms against its authority. It is the fact of war which calls this constitutional right into action, and not any vagrant power supposed to come forth from chaos at the invocation of the plea of necessity; a plea which justifies nothing, because it justifies every thing.

It surely cannot be pretended that the constitutional clause imposing upon the President the duty "to take care that the laws be faithfully executed," would authorize him to interpose in every case where the laws may be broken or even resisted, and thus to supersede the ordinary functions of the judiciary by those of a tyrant's discretion.

Such a power would enable him to displace judicial action, in every instance where its exercise is possible; not merely in a state of war, but in time of peace.

But the question of the greatest difficulty is not that which relates to the mere

existence of the power of war to subjugate the forces of the rebellion, but that which concerns the incidents and extent of the power.

Some wild theorists even allege that the power to wage this civil war against the insurrection, carries with it the transcendant power of general confiscation over all the property situated in the States where the insurrection rages, as well as to strike down whatever State institution the Government may deem even indirectly opposed to the success of its arms.

Now, we have already shown that the war must be waged to restore the Constitution; and hence, the war power itself must not trample that instrument in the dust. But the adoption of any such policy as that recommended, would be as flagrant an invasion of the rights reserved to the States and to the people, as it would be an outrage against the usages of modern warfare.

The Constitution expressly forbids the taking of "private property for public use without just compensation."

The terms of the clause imply two restrictions: *first*, that whenever private property is taken by the Government the act must be accompanied with "compensation;" and *secondly*, that such property can only be taken for "public use," and, consequently, not for "private use," or for any other use whatsoever.

Therefore, without annulling that clause of the Constitution, it is clearly impossible to confiscate the property of even the rebels themselves, unless when it is in actual use as an instrument of war. But, in the latter predicament, the property is no longer private in the constitutional sense. It has passed into the species of public property, belonging to an enemy, and thus become liable to capture under the laws of war. . .

The proposed general emancipation of slaves is repugnant to the second prohibition implied in the clause quoted, as well as to the first; because the proposition here is not to take the slaves and convert them to "public use" at all, but to liberate them from subjection as property.

I know it has been contended, by a statesman of great name, that war gives to the military commander the power to abolish slavery whenever the powers of war entitle him to set aside the civil authority. And he adduces two examples of the exercise of such a power in the war of the Columbian revolution—one by the Spanish General, Murillo, and the other by the revolutionary General, Bolivar.

It is surprising that a mind so acute did not perceive the utter impertinence of the precedents cited in their application to the case of the Southern people. In the first instance, the Spanish General was bound by no Constitution, since Spain acknowledged none, at least in regard to the American colonies In the second instance, Bolivar, heading an independent force did not, for the time, recognize any other powers than those of the sword, and did not pretend to employ any other. While both examples are from the half-barbarous and bloody annals of a cruel race, infamous in every age for its violations of the laws of war.

It is true, a Senator, also of high reputation, by a more thorough research of universal history, has recently been able to discover another precedent evincing the competence of war to break the chains of the slave. But he had to accept this third example from the horrors of the most frightful civil war that ever desolated the earth, and at the hands of its greatest monster, the insatiably revengeful Marius!

However, a bare statement of the argument, propounded by Mr. Adams, is enough to demonstrate its fallacy. It is concisely this: Since military power, within the sphere of its operations takes the place of all civil authority, it thereby necessarily acquires the right to decree the general emancipation of slaves.

Now, the sophistry of this logic consists in its tacitly assuming that the military power not only suspends the local civil authorities, but also, at the same time, the general and supreme authority of the Constitution. But will any one say that this is so? Can war be waged at all, especially in the territories of the Union, but under the warrant of the Constitution? And can any one, who acts by the authority of the Constitution, pretend to have the privilege of breaking it? Is not then the assertion, that any power known to our system, whether civil or military, State or Federal, can supersede the Constitution in any particular, a revolutionary doctrine, as rebellious in its character as secession itself? There is a single constitutional right, which may be suspended, for a time, and that is the "privilege of the writ of *habeas corpus*." But such suspension being provided for by the Constitution, is itself constitutional, and, therefore, not repugnant to it. This subject, however, will be considered more fully in the sequel.

If the confiscation of private property suggested would thus be a clear infraction of the Federal Compact, it would be not less an enormity against the practice of civilized nations.

"The general usage of war is," says Chancellor Kent, "not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war; or when captured in places carried by storm, and which have repelled all the overtures of a capitulation."

And according to Vattel: "For the same reasons which render the observance of those maxims a matter of obligation between State and State, it becomes equally and even more necessary in the unhappy circumstance of two incensed parties lacerating their common country."

Nevertheless, I am sensible that to every argument of reason, and consideration of justice and humanity, the same objection of political delusion will be urged—that the Southern people have forfeited all their rights under the Constitution, by their treason against it.

This objection, however, has been already fully answered; since, it has been clearly shown, that no one can be arraigned for the crime of treason, who has not voluntarily participated in rebellion against the government.

And it is perfectly apparent that since the war is intended, not to destroy the Constitution, but to preserve it, the Government can gain no new powers, by putting down the rebellion, other than those it possessed before.

"The act of the people," says Rutherforth, "however injurious it may be, will not increase the power of the sovereign, or will not give him a right to any more power than the Constitution has given him.

"For the sovereign power was originally vested in the collective body of the society, *called the people*. The sovereign cannot of right claim any greater part of it, than the people have granted to him by compact in forming the Constitution.

"When the people violate the compact on their side, it is voidable at the sovereign's discretion.

"If he choses to abide by it, he has no right to any other power, than he derives from it—and if he choses to make it void instead of gaining a greater part of the supreme power, he will loose what he has, and it will, as in the other case, revert to the people.

"Thus the people may claim to change the Constitution when the sovereign invades their part of the power, whereas, *he can only claim to continue the Constitution* though the people should causelessly and wrongfully invade his part.

"This is the whole of his right, and no event whatsoever can give him a more extensive right without the consent of the people.

"If the struggle between him and them should end in civil war, and victory should declare itself on his side, yet conquest will not of right increase his power, however strongly we may put the case in his favor, by supposing the breach of the

Constitution to have begun from the people, and the whole blame of the war rests upon them.

"For the use of force, though it should be superior to the force opposed to it, only serves to support a right which might otherwise have been hindered from taking effect; it does not produce a right where there was none before."

The proposed general confiscation of Southern property is as repugnant to the rules of expediency as it is to that of constitutional power. It is simply a proposal to convert every Southern man into an enemy, and to perpetuate the hostility through all future generations. It is a proposal to make the Southern States forever what Ireland is to England, what Italy has been to Austria, what Poland has been to Russia.

It is a proposal to treat all Southern territory as a conquered province, in order to rule it at the expense of a standing army of half a million of bayonets. Such a policy can never hope to restore the Union, while it would be sheer suicide to the Constitution. Such a policy might create unity, which is a very different thing from union; but it would be the unity of a frightful despotism over both the South and the North.

Besides, this extreme policy would insure the defeat of the very object which its advocates have chiefly in their view, namely, the emancipation of the slave. Its immediate effect would be to array the whole South as one man in the most deadly hostility to the Government, and thus render all hopes of reconciliation utterly impossible for all time to come. Disunion would then be a fact already accomplished. But this would leave the Confederate States forever free from all restraint, whether physical or moral, to pursue their favorite schemes for the extension and perpetuation of slavery. While the gates of the ocean would be thrown open for fresh importations from Africa, a military despotism of great strength would be so firmly seated in the South, as to prevent all attempts of servile insurrection. It is thus that the only hope of emancipation for the slave is connected with the preservation of the Union, and with that silent progress of intelligence and virtue which the Union alone can guarantee.

A distinction must be taken between the powers which the Government may wield, so long as the insurrectionary force is capable of affording it effectual resistance, and those which are to be employed, so soon as that force shall be subjugated. While the war continues the President must conduct it, by the instrumentality of the military force; but when the war ceases, upon having accomplished its end, then *ipso facto*, the functions of the war power cease, and those of the judiciary are replaced in complete authority.

Because, although the President has the lawful power to conquer any organized force which resists the exercise of Federal jurisdiction in any part of the national territory, yet he has no power or pretense of authority to punish any offenses other than those against the laws of war. The President cannot punish treason any more than he can punish ordinary homicide or larceny. He can only conquer traitors, and then turn them over to the courts.

The principle, just announced, stands upon that article of the Constitution which prescribes, that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

Here, the power to punish is unquestionably denied to any other authority than the judiciary, except in the case of strictly military persons. And the prohibition extends in terms to "time of war or public danger." Therefore, it matters not how

fearful may be the war, or how pressing the necessity of the public danger, though every institution in the land should tremble on the verge of national ruin, still no non-military person can be capitally punished, or punished for any infamous crime, but by a judicial sentence.

However, it does not thence follow that a military tribunal cannot punish spies, and others offending against the known rules of war. Because, spies, by assuming the fictitious character of friends, and by pretending to act in aid of the military force, subject themselves voluntarily to the laws governing such force, and by their own conduct are thus estopped from disputing a fact, which they have thus solemnly asserted, for so base a purpose.

It follows, also, that the President has no power to punish even the insurgents taken in battle. They may be slain, if they will not submit. In the same manner, the marshal may slay one who resists, to the death, the execution of civil process. But should the agent of military power go beyond this, and assume to punish capitally the prisoners who have surrendered themselves, the act is, in a civil sense, murder, and in a military one a monstrous outrage against the laws of war.

It results from the same course of reasoning, that whenever the contest shall be terminated by the triumph of the Federal arms, whatever prisoners the Government may think fit to hold responsible for treason, must be tried by the courts under the direction of legal and constitutional forms. Only the question as to what persons shall be arraigned is still left to the discretion of the Government, which will be required to take care that, in making the selection, it does not transcend the necessities of a proper example, and the laws of humanity and mercy.

"When," says Vattel, "the sovereign has subdued the opposite party, and reduced them to submit and sue for peace, he may except from the amnesty the authors of the disturbance—the heads of the party: he may bring them to a legal trial, and punish them, if they be found guilty. He may act in this manner particularly on occasion of these disturbances in which the interests of the people are not so much the object in view as the private aims of some powerful individuals, and which rather deserve the appellation of *revolt*, than *civil war*."

In the case of our Government, the power to punish for treason is under the limitation of that clause in the Constitution, which provides, that "Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

Here, then, the sweeping power of confiscation for treason, so vehemently urged by our zealous yet revolutionary friends, cannot possibly be exercised without overturning the Constitution.

With such wonderful foresight did the wisdom of a better age provide for the protection of all the rights of life, liberty, and property, that no ruthless hand, whether of fanaticism or revenge, can strike one of them down, without first shattering into fragments the shield of the blessed Constitution which guards them all alike.

But if the Government cannot confiscate the *private* property of the rebels, which is situated in the seceded States, neither can it claim the right to do so, as to that which may be found within the limits of the loyal States. Because, the same constitutional guarantees are always operative to protect the property of citizens, whatever may be its locality.

It is no answer to this reasoning, to say that the rebel government has assumed the power to confiscate all the property situated in the seceded States, belonging to persons domiciled or doing business in the loyal States. Because, the rebel government may perform, in perfect logical accordance with its political theory, many

acts which the Federal Government cannot do, without the utter subversion of its own theory of the war. The rebel government assumes that the Constitution, as to it, has become null, and under the pretension of its independence, it treats the subjects of all other powers as aliens, and especially, the citizens of the United States as alien enemies. But the theory of the Federal Government is as different as day from darkness. It affirms as a prime postulate of all its arguments, whether of the pen or the sword, that the Constitution is in as vigorous force as ever. Consequently, should our Government claim the right to treat the people of the so called seceded States as aliens, the assumption would be logically a self-contradiction. Because the war is waged, upon the sole hypothesis of their being citizens.

The Government has clearly the power to forbid the passage of men or munitions of war, into the States where the insurrection predominates, if intended to be used in aid of it. Because the power to overcome the rebellious force at all, necessarily implies the power to take away from it all the means of resistance. But it is plain that the Government can do this only by virtue of the war power, namely, the right to conquer, by the military force, a public enemy of the nation.

The preceding view fully accords with the recent acts of Congress, and with the circular of the Secretaries of State and the Treasury, which both confine the right of capture to property used, or intended to be used, in furtherance of the insurrection only. And the act of August the 6th, employs the correct phraseology when it declares, that all such property shall be "the lawful subject of *prize* and *capture* wherever found,"

This places the right on its true foundation as a logical result of the war power. For the moment when property is appropriated, either in fact or intention, to purposes of organized hostility against a nation, it loses its private character, and becomes instantly, public.

To avoid the constitutional difficulties which stand opposed to any general confiscation of Southern property, another plan has been suggested, but one even more chimerical than those already considered. And this is to put forth a solemn declaration by Congress that the people of the seceded States are alien enemies; and then to treat them in accordance with such declaration.

Now, the first objection to this plan is, that it proposes to recognize the very fact which the secessionists are waging war to establish, and which we are denying under arms before all the world, namely, that the so-called seceded States have *de jure* the political character of foreign powers. Because, there can be no alien enemies, unless they be the subjects of foreign powers. Hence, if the United States, by its legislation concede this fact, all the other nations of the earth would be justified in the immediate acknowledgment of the Confederate States as an independent government. We cannot expect, on the part of other nations, a refusal to admit what we ourselves see fit to proclaim in the most public and formal manner, and especially when it is their desire and interest to make the admission even against our strenuous opposition.

But an equally fatal objection is, that it would not give the supposed power of confiscation.

Because, as we have already seen, the usages of civilized warfare will not allow us to touch the mere private property of even alien enemies. We could not do it, without denying, at once, our humanity and civilization, and taking a voluntary relapse into barbarism.

Moreover, there is a third objection still more decisive, and that is, that the act o confiscation, in a legal point of view, would be a mere nullity. Because, as soon

as the war shall terminate with the restoration of the Union, the traitors themselves must necessarily have the right to sue in the courts for the recovery of their property; and no plea can be imagined by which they could be barred. For, certainly, no one will pretend that they could be treated as alien enemies after the overthrow of the revolutionary powers.

And, therefore, at the end of the war, all their rights would stand again on the basis of the Constitution, and with no power in our system to divest them by any other means than a regular conviction and sentence under the guarantee of constitutional forms.

The Constitution expressly declares that "no person shall be deprived of life, liberty, or *property*, without due process of law."

And hence, Congress can have no authority to take away a man's property by legislative action, any more than to take away his liberty, or his life. Any deprivation of either must be in pursuance of a judicial determination founded upon proper legal process.

It is true, that during the continuance of the war, and so long as the rebels maintain their attitude of open hostility to the Government, the latter may, for the time, treat them as alien enemies, *de facto*, for belligerent purposes; and consequently may prevent them from using even their private property in any manner to aid in the movement of the insurrectionary forces. But this right of *prevention* in the Government is one strictly appertaining to the military power. It is one of the rights incidental to martial law. Hence, it is one to be exercised by the President, or his subordinate military agents, and not at all by Congress. It is also perfectly clear that this right of the President to prevent the rebels from employing their property in aid of the rebellion, is but temporary, and, since it is a power springing out of the war, it must necessarily expire with the war. It is a mere power to prevent property from being used in a hostile manner against the Government, and not any power to *divest* or transfer titles.

Moreover, any attempt on the part of Congress to take away, or transfer, the title to property, by mere legislative enactment, would be the palpable usurpation of a power which the Constitution has wisely vested in a different branch of the Government. To divest the title of property, against the will of the owner, is, in no proper sense, a legislative act, but one altogether judicial. But will any one pretend that either Congress or the President can exercise judicial functions? Such a confusion of powers is characteristic of the worst forms of despotism. The most bitter denunciation of historians has always been leveled at such acts of the executive or legislature as assume to deprive the subject of his property, without a regular adjudication by the courts.

It has even been proposed to take away the property of secessionists and bestow it upon loyal men by way of compensating the latter for losses which they have sustained at the hands of other secessionists.

Now, aside from the consideration that such an act would be purely judicial there may be stated a still more serious objection to its practical exercise. The punishment of any person for merely holding the opinions of the secessionists would be unprecedented barbarity. Opinion is not the subject of punishment at all with any but savages. Until thought has been evolved into action, it can never be justly amenable to the censure of any human tribunal. Even the maxim *scribere est agere*, adopted by a judge whom the whole world regards with horror, in order to convict Algernon Sydney of treason, has been denounced by all subsequent lawyers, as well as historians.

Shall it be left to free Americans to change that atrocious maxim for the worse by inscribing on their criminal records *cogitare est agere;* or *dicere est agere?* At all events if even *thought* or *speech* could be considered treason, the question would not be for the decision of Congress, but exclusively for the courts.

But a tendency to usurpation still more alarming, although in a different direction, has lately been manifested on the part of Congress, in the attempt of that body to control the operations of the War Department in matters of a purely military character. The members of Congress who have participated in this revolutionary project seem to be acting under the delusive idea that the Federal Legislature has inherited all the sovereignty of the British Parliament, and may, therefore, adopt any precedent found in the history of the latter. The British theory has been stated by Blackstone in this brief sentence: "Sovereignty and Legislature are indeed convertible terms—one cannot subsist without the other." It is obvious, however, that our system is based upon an idea altogether different; that is to say, on the *distribution* of the sovereign powers, and not upon their *consolidation*. And hence, with us, it is axiomatic that no *branch* of the Government can exercise any powers other than those which are expressly given or necessarily implied. And, therefore, those who deny a given power to any department are not required to show a positive inhibition of the power in the Constitution. It is enough to say that such power is not conferred in that instrument. By what pretension of right can Congress, then, assume a supremacy over the War Power, to compel the latter to disclose secrets, the revelation of which it deems detrimental to the success of our arms? Can we imagine a more flagrant act of usurpation than this? And would it not clearly justify the Executive in the exercise of martial law in respect to all such members of Congress as join in this new species of rebellion? The same rule must apply to members of Congress as to the Judges of the Courts. If either undertake to interfere with the appropriate action of the military power, they must be put out of the way until the war is over, or, at least, until they withdraw their mischievous opposition to the only authority which the sovereignty of the people has, by the Constitution itself, invested with the competency to conduct the war at all.

Another inquiry of extreme moment relates to the power of suspending the writ of *habeas corpus* in the case of persons who may be arrested in the loyal States, for alleged complicity with the rebellion.

Now, it is plainly of the first importance to obtain a correct answer to this question, and for two special reasons: First, because in the early stage of the rebellion, the exercise of this power afforded the only available means to prevent the insurrection from drawing large military resources from the very heart of the Union, and perhaps also, from spreading the contagion of treason into territory then mostly free from it—and the peril may be again repeated; and secondly, because it has been against the manifestation of this power, that the advocates and friends of secession have been the most clamorous in their out-cries of denunciation, thereby proving its practical necessity by the very invective which denied its lawfulness.

The power of suspension, whatever may be its nature and extent, rests upon this clause of the Constitution: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it."

It is apparent that the language of the provision is perfectly lucid, as far as it goes; and the sole difficulty connected with it is, that it does not indicate the depositary of the power limited, either in terms, or by implicit reference.

The consequence has been, that different opinions have been entertained on the subject, some jurists of eminent character asserting for Congress the exclusive authority of suspension, while others of equal reputation have attributed the exclusive power to the President; and a third party of no less legal celebrity has located it distributively in Congress and the President, as a concurrent power in both.

In the absence of any decisive critical test for the inquiry, and amidst such disagreement, it does not become any one, much less one not a lawyer, to speak too positively of the matter. Nevertheless, it does seem to the present writer, that one consideration has been overlooked in the discussion, which is capable of throwing upon it a very clear light. It would seem that the shortest and most certain method of ascertaining WHO is to exercise the power, since no department is specially designated, must be to determine the class to which the given power naturally belongs, whether that be legislative or executive; and if the latter, then of what species, namely, whether it be civil or military.

But viewing the subject from this analytic point, the *discretion* to suspend the writ is seen, at once, to fall naturally under the class of military powers, or of those which appertain to the direction of the public force against an armed enemy, whether foreign or domestic.

Because, the Constitution itself defines the prescribed occasions when the writ can be suspended, at all, to be "cases of rebellion or invasion" where the "public safety requires it." Here two things must concur to justify the exercise of the power. There must not only be rebellion, or invasion, but also a necessity to suspend the writ, imposed by the public safety.

But all these terms relate properly not to the functions of *legislation* but to those of *execution* in the control of military measures. It is the military force which cases of rebellion and invasion call into activity. It is the same force which great peril to the public safety puts in motion. It is this force, too, in the freedom of its evolutions which the writ of *habeas corpus* may disturb and fetter. And, therefore, by inevitable logic it is the commander of the military force who ought to possess the power of setting aside the writ of *habeas corpus* when he finds it employed mischievously to defeat the operations of war.

Again, it would appear very difficult to determine beforehand, or for a numerous body of non-military persons, such as the members of Congress, to determine, at all, the peculiar cases when and where rebellion or invasion may produce such danger to the public safety as to require the writ to be suspended. Rebellion may conceal its preparations so carefully as to come like the shock of an earthquake without sign or premonition, and at a time when Congress does not sit. An invasion, insignificant to-day, by changing the point of attack may become almost overwhelming to-morrow; and then the next day after the crisis of a single battle the peril to the "public safety" may be past..

But it is obvious that as the peril to the public safety changes, either in time or place, so does the necessity which justifies the suspension of the writ of *habeas corpus*. Hence, if the power to suspend were vested exclusively in Congress, the writ would probably seldom be suspended soon enough, and could hardly fail to remain suspended, at least in most instances, too long.

Moreover, the specific difference between legislative and executive power may be defined most accurately by a statement of their opposite functions. Thus the former makes laws; the latter puts them into practice.

Or, as expressed by Rutherforth, "The legislative power is the joint understanding of the society, directing what is proper to be done."

"The executive power is the joint strength of the society, exerting itself in taking care that what is so directed shall be done."

In a word, the characteristic of legislative power is to speak, that of the executive power is to act.

But the suspension of the writ, in a special case, evidently appertains not so properly to speech as to action. And hence, all the attributes of the power in question seem to class it with those of execution, and to preclude any salutary exercise of it on the part of Congress.

It may be that Congress has some kind of authority over the subject, in a general way, under the Constitutional grant, "To make Rules for the Government and Regulations of the Land and the Naval Forces."

Nevertheless, if Congress can claim any such regulative authority, its operation must necessarily be very much restricted, by the fact that the supreme legislative power has in the Constitution defined the *occasion* when alone the privilege of the writ of *habeas corpus* can be lawfully suspended, with as great a degree of particularity as the nature of the case admits, and has left nothing to the discretion of Congress. Nor is there any power in our system which can modify the constitutional definition by increase or subtraction of a single term. For, surely, no Federal authority can suspend the writ unless "in case of rebellion or invasion; but not even then unless the public safety may require it."

Are we not, then, obviously entitled to take another and bolder step in the analysis of this power?

Since it has been proved that the power of suspension arises only in special circumstances relating exclusively to the operations of war, may we not affirm that when these circumstances concur the writ *eo instanti*, stands suspended by force of the Constitution alone, and that it then becomes not so much the right as the duty of the military commander to proclaim it. This view would confer on the chief of the military force in any district as soon as the concurrence of the essential facts defined in the Constitution should become clearly manifest, a full authority to declare the occasion present for asserting the supremacy of martial law.

For this martial law differs from civil law in the same manner as a state of war is opposed to a state of peace. War has its own law as well as peace. The law of war is martial law. But martial law is nothing more than the application of military force to overcome the resistance of an enemy who acknowledges no other rule than that of force. And hence, in the presence of such an enemy, the military commander must necessarily have the power to set aside every civil authority which might assume to interfere in any way so as to control or embarrass the operations of the war. A denial of this power virtually carries with it the denial of any power to render war effectual in any case whatsoever. If the civil judge can issue a *writ of ejectment* for the ground upon which a military encampment or fortress is situated, or *replevin* for the artillery horses on the eve of battle; or a *habeas corpus* to bring before him the bodies of soldiers or captives alleged to be illegally detained, then there is an end of all military authority, and the commander might as well raise the white flag and submit to the enemy at once.

Hence, it is unquestionable that the chief of any distinct military command must necessarily have the right to employ martial law. But that is the right to exclude the civil judge. And that, again, is *per se*, a suspension of the writ of *habeas corpus*.

And thus, the old maxim, *inter arma leges silent*, is as true now as it was the day when Cicero penned it.

It is the command of the military chief, giving his orders to the military force which hushes the laws into so deep a silence.

But even the proclamation of martial law does not supersede the ordinary functions of judicial power to any greater extent than may be requisite to accomplish the special military purpose of the occasion which necessitates the measure. It does not confer upon the commander any authority to try offenses other than those against the usages of war. It does not invest him with a commission to determine civil suits between private parties.

He is arbiter only in the great controversy of arms, and he applies to the issue before him, not the rule of municipal jurisprudence, but the stern law of war. His sole office is to direct the use of military force so as to conquer a given resistance, and he removes out of his way whatever impediment may tend to prevent or obstruct the successful employment of that force. Hence, if even judicial authority stands in the way, he puts it aside for the time. But this definition of martial law obviously leaves the judge at liberty to sit in all cases which do not fall within the province of military command, or otherwise affect such means as may be dictated by the policy of war.

We have now reached the last question appertaining to the general subject of power; and this refers to the authority of the President to arrest and imprison the persons of alleged friends and adherents of the rebellion in the loyal States.

If one examines this inquiry with proper attention and freedom from prejudice, he cannot fail to be astonished that it should ever have been mooted at all. For, can it matter, in the view of the Constitution, in what part of the United States the "public safety" may require the writ of *habeas corpus* to "be suspended," provided the necessity results from a case of "invasion" or "rebellion," waged anywhere against the national flag?

Or can it matter, according to the laws of war, in what locality, an adherent of the public enemy may choose to carry on the work of a common hostility? If a foe taken on the battle field in Virginia may be imprisoned, during the war, what rule of natural justice shall exempt, from a like fate, the friend of treason, who is sending to its aid arms or information from Maryland? Is the character of a rebel spy more sacred than that of a rebel soldier?

But neither the man of Virginia nor the man of Maryland can be said to be imprisoned, merely because he is assumed to be a traitor—which would be a reason for detention under the civil authority only: but both of them are imprisoned because they belong to the revolutionary force, which is exclusively a military reason. And can this be represented as a matter of grave complaint? What! Shall it be said that any person can plead, as a cause of exemption from confinement, the singular excuse that, besides being an enemy, he is a traitor also?

It is as clear as sun-light to all who are willing to see, that the same provisions of the Constitution, and the same laws of civil war, which justify the Government in imprisoning its foes taken in open fight, will equally justify it in the capture and detention, not only of those who may be on the march to join the enemy, but also of those who may be secretly preparing to raise the colors of the enemy, on any part of the national territory. And this latter was the precise predicament of the persons arrested and detained under the order of the President, in the State of Maryland, and elsewhere. They were all, without a single exception, either pledged to the allegiance of the revolutionary power, or else making preparations to strike in its favor, and against the Government. And the political authority of a nation, any more than any private person, is not obliged to wait until a blow impending is

actually struck, which might perhaps then prove irresistible. But the Government like the individual, may anticipate the blow, by disarming its antagonist, and by holding him until he ceases to threaten hostilities; or, at least, until the force with which he has been in concert has been overcome, or weakened so far as to have ceased to be dangerous.

Nor is there one writer upon natural law, that does not recognize such a power, of self-protection in every government. What the right of self-defense is to individuals, the war power is to nations.

And in either case, the necessary prevention of danger stands justified by the same reasons, which justify resistance when the peril is present.

Indeed, the only difference, in rational principle, between the case of an insurgent taken in battle, and that of an unarmed *adherent* of the revolutionary force, refers, not to the question of right, but to the question of evidence. In the case of those who are captured in fight there can be no doubt as to the fact of hostility, while in the case of others, every degree of doubt may be possible.

There is, however, one criterion, the application of which furnishes a testimony as infallible, upon the question of hostility, as that afforded by any belligerent acts whatsoever. And this criterion becomes decisive whenever, in any case, the oath of allegiance is demanded by the Government and refused on the part of any citizen of the United States.

Allegiance is defined by Lord Coke to be "a true and faithful obedience of the subject due to his sovereign." Or, in the words of Justice Story, "Allegiance is nothing more than the tie or duty of obedience of a subject to his sovereign, under whose protection he is." But however the thing may be defined, it is manifest from its very nature—and all the authorities agree in this opinion, that every government has a right to exact from all citizens, at its discretion, a public pledge of their fidelity, by taking the oath of allegiance, or other formal and solemn declaration of loyalty. "Every citizen," says Chancellor Kent, "may, on a proper occasion, be required to take the oath of allegiance."

This principle acquires a peculiar interest and importance for us from its pertinence to a case of insurrection. The civil war has divided the common country for a time, and raised up in it a revolutionary power, which asserts its independence by an appeal to arms. But what would be the result as to the *status* of individual citizens if this revolutionary power should be able to make good its claim, and thus permanently dismember the nation into two separate and independent empires?

The case is simply this. A nation previously one divides itself into two. Then, what rule does the allegiance of the individual citizen follow? As this allegiance was, before, one in reference to the one nation, how shall it be distributed between the two nations emerging out of the revolution?

And here Chancellor Kent concurs with other eminent jurists in laying down the rule that during the revolutionary contest every citizen has the right of election and may transfer his allegiance to either of the rival governments at his option.

Of course the rule is limited by the essential qualification that the right of election asserted remains merely *in fieri*, while the war is progressing, and can only become perfect when the nationality of the new government has been fully established.

Hence, it follows that whenever an insurrectionary force is organized, in any country, and especially when it puts forth the claim to act as an independent power, then the lawful government has necessarily the right to treat such adverse force, and all those who adhere to it by election, as public enemies, at least *ad interim;*

and, therefore, to deal with them according to the established usages of war. In other words, the Government may choose to admit provisionally, or for belligerent purposes, the assertion of the revolutionary power, and of its adherents, that it is an independent public enemy, and, therefore, may act upon that assumption, not as an abstract truth, but as a practical postulate granted on the other side. For, certainly, there can be no wrong or shadow of injustice in attributing to any person the very character which he claims, at the peril of life itself, to be his own.

It is, indeed, very true that the Government is not obliged to recognize this character of belligerents asserted by the forces of the rebellion. To do so, is the concession, for a time, of a privilege, and not the denial of any right even pretended.

The Government, if it should see fit, may consider the matter in a far different light; and may treat it as a question of bald treason, by turning over all captives taken in arms, as well as all active adherents of the insurrection, to be tried and punished in the criminal courts. And it must do either the one or the other. It must imprison or it must punish, or else renounce all pretensions of political authority, and virtually abdicate its functions. There is no other imaginable alternative.

Now, suppose the Government to exercise its prerogative to try and punish while the war is going on, and the event more or less doubtful. One general outburst of indignation would be heard from the whole civilized world against the barbarity of such a proceeding, and none would be louder in their censure than those pretended friends of constitutional freedom who now so bitterly assail the Administration for employing the more humane and prudent remedy of imprisonment.

However, although it must be admitted that the Government has the naked legal right to try the captives it has taken for treason, such a course would not only be contrary to civilized usage, but also a great moral wrong. Because, so long as the forces of rebellion are able to keep the field, there always will remain the bare possibility that they may ultimately prove successful. But what follows then? Why that none of them can be considered guilty of any crime at all. For in the view of all nations success justifies from the guilt of treason, or rather transforms it into complete legitimacy.

And hence the epigram:

> "Treason never prospers: What's the reason?
> That when it prospers, none dare call it treason."

Therefore, there was but one course left for the Government, namely, to imprison all captives until the question of their final guilt shall be determined by the result of the war.

To ascertain, by competent evidence, who are adherents of the revolutionary power, in the loyal States, the Government has applied the criterion of a tender of the oath of allegiance; discharging all who show themselves willing to pledge their fidelity to the nation as their fathers constituted it, and detaining those only who refuse to acknowledge their subjection to Federal authority. Could any thing be, at the same time, more just, or more merciful than this? Besides, as an evidential test, the rule operates demonstratively.

Because, whoever refuses to pledge his allegiance to the Government under which he lives, by that act, virtually denies its jurisdiction over him, and voluntarily assumes the character of a public enemy. By the same conduct he also reveals the profound hostility of his heart towards the Federal authority, and the obstinate determination of his will to resist it.

Shall the President then be reproached for conceding to these adherents of rebel-

lion, the very character which they willingly, and even proudly assume? May he not well recognize them as what they are, *de facto*, though not *de jure*, public enemies of the nation?

And if the President can do this, he may deal with them while the war continues, not as criminals merely, but as prisoners of war. But if they can be deemed prisoners of war, it must be admitted by all, that no writ of *habeas corpus* can touch the case of their detention. Because that rests exclusively in the discretion of the war power. To hold otherwise would be to transfer the authority of a chief command from the President, and vest it in the judges of a hundred local courts.

It must be admitted, however, that any alleged adherent of the insurrection may renounce the benefit of this belligerent character, at his pleasure. By taking the oath of allegiance, he may recede from his voluntary attitude as a public enemy, and then demand a trial before the courts. But this the Northern traitors have shown themselves utterly unwilling to do; because they are well aware of the fact, which many Union men have so strangely failed to comprehend, that the imprisonment complained of, is a benefit rather than a burden—not an oppression at the hands of tyranny, but the privilege of exemption, for a time at least, from the merited punishment of treason. Hence, although the Government has tendered a release to all these prisoners upon the condition of swearing allegiance, a condition so easy, and also in accordance with duty, they yet deliberately reject the boon of liberty. Each one carries the key to his jail in his own pocket; but no one choses to unlock the prison doors. Because all are conscious that safety, for them, lies within, and not without, the walls.

The discussion, thus far, has related chiefly to the powers of the Government, in its dealings with the rebels in arms, or with such adherents of treason as may be secretly giving them assistance. And a few words must now be devoted to the subject of its duty in respect to the loyal citizens, whose misfortune it is, but certainly not their fault, to have their homes within the limits of the seceded States.

In order to comprehend clearly this duty on the part of the Government, it may be necessary to define concisely the present political condition and relation of the hundreds of thousands in the South who still cling in firm allegiance of the heart to the Constitution, which has been annulled by the authorities of their States, and the Union whose protection is so far away.

Now, in the first place, it is true beyond all controversy, that whenever a State withdraws from the Union wrongfully, that is to say, in a case where the Federal Compact has not been broken by the General Government, such action on the part of the State is a breach of her own State Constitution, as well as of the Federal Constitution. Because each of these Constitutions is an essential part of that complex political system under which we live, and every citizen inherits different rights, and is bound by different obligations under each; the whole of these together blending to make the sum of his civil liberties and duties. Therefore, any action of either government, whether of the Nation or of the State, which would take away the vested rights of the citizen of either, must necessarily involve a violation of the general political compact, which secures all his liberties, though by different means.

And that the secession of a State does thus directly tend to diminish the rights of its own citizens, may be proved in the most conclusive manner.

For example, the Federal Constitution guarantees a republican form of government to every State, and therefore, to the citizens of every State. But the act of

secession blots out forever that valuable political right of the citizen, and leaves it to the caprice of the State Government to establish either an aristocracy, or monarchy, or what the seceded States have in fact established, a pure military despotism.

Again, the citizen of a State, by force of the Constitution, is virtually a citizen of every other State in the Union. But the act of secession obliterates this precious privilege also, and leaves its victim an alien to one half of the Federal territory, perhaps to the very State of his birth, even to the native mountain, which was as a brother of his boyhood.

Again, the right of every citizen of a State in her appropriate Constitutional relation, is to have his liberty and independence from the control of foreign powers, as well as from the lawless force of domestic revolt, protected by the whole public power of the United States. But the act of secession tears this glorious right away, too, and places the citizen of a once great empire in a condition of despicable national inferiority.

Hence, according to the settled principles of natural and political law, the act of secession, by these gross and palpable violations of the Social Compact, discharges all citizens from their allegiance to State authority; and therefore leaves them at perfect liberty to constitute a new State any where within the limits of their former State, now dissolved by the usurpation of a force hostile to the National Government; or, if not possessed of sufficient numerical strength to maintain a State organization, to enter into the territorial condition under the full sovereignty of the General Government, if they choose to do so.

This latter alternative results necessarily from the premises. Because, the right of citizens to constitute a State, like all other rights, may, of course, be waived at their pleasure.

In the second place, since the discharge of their allegiance to their own State on account of its palpable violations of the Constitution, cannot sever the tie which binds such citizens to the General Government, it follows necessarily that the latter is obliged, by a sworn duty, to interpose for the protection of their constitutional rights, and to overthrow, if possible, those revolutionary powers which at once oppress the liberties of the individual, and defy the authority of the nation.

But if the United States should, from any cause, prove unable to expel the revolutionary force from every part of a seceded State, it is, nevertheless, a solemn national duty to put it aside as far as may be, and thus give the loyal citizens an opportunity to form a new State for themselves, at least, in that portion of the former State which may be so freed from the sway of the insurgents, or to become a Territory under the sovereignty of Congress, at their option.

The duties of allegiance and protection are reciprocal. Hence, if the supreme power of the nation should not, within a reasonable time, afford that protection which is their Federal right to its own citizens of the South, they will be forever released from their allegiance.

And thus will pass away, as if it had never been, that glorious Union, which has been the centre of so many precious hopes, the subject of so many earnest prayers, the magical name which oppressed nations have so long murmured in all their dreams of liberty, and which had power to make tyrants tremble on the most ancient thrones. Gone, forever, will then be the most promising example of popular government which the annals of time have known, and perhaps ages of dreary darkness must roll away before humanity shall recover heart to repeat the exam-

ple which has now so sadly failed! The misfortune will not be felt merely upon this continent, or by the present age only. It will be as well the memory of a mighty loss to the world at large, and to generations both near and far remote in the future years.

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